Supreme Court, U. S.
FILED
MAY 28 1980
MICHAEL RODAK, JR., CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

**No. 79-1804**

**RODOLFO GARCIA-JARAMILLO,**

**Petitioner,**

**vs.**

**IMMIGRATION AND NATURALIZATION SERVICE,**

**Respondent.**

## SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## INDEX TO APPENDICES


**Page**

Appendix "E"
Order to Show Cause ..... 4

Appendix "F"
Order of Deportation ..... 6

Appendix "G"
Order or decision of the Board of Immigration Appeals ..... 12

Proof of Service ..... 14

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COMES NOW petitioner, RODOLFO GARCIA-JARAMILLO, through his attorney, Frederick Hetter, and respectfully submits his Supplement to the Petition For A Writ of Certiorari, filed May 12, 1980.

1. Petitioner inadvertently failed to include certain appendices which petitioner hereby seeks to place before this Court.

2. On page 3, paragraph 8 of the Petition, petitioner

referred to an Order to Show Cause issued by the San Diego District Director. Copy of said Order to Show Cause is now attached as Appendix "E".

3. On page 3, paragraph 9 of the Petition, petitioner referred to an Order of Deportation or decision dated May 17, 1977; copy of said decision is now attached as Appendix "F".

4. On page 4, paragraph 10 of the Petition, petitioner referred to an Order or decision of the Board of Immigration Appeals dated May 30, 1978; copy of said decision is now attached as Appendix "G".

5. On pages 18 to 23 of the Petition, the Opinion of the Court of Appeals for the Ninth Circuit was made as Appendix "A". The same was filed with the Clerk of the Court on September 24, 1979, and received by petitioner on September 26, 1979.

6. On page 24 of the Petition, the Order of the Court of Appeals for the Ninth Circuit was made as Appendix "B". The same was filed with the Clerk of the Court on January 2, 1980, and received by petitioner on January 4, 1980.

7. On page 24 of the Petition, the Order of the Court of Appeals for the Ninth Circuit was made as Appendix "C". The same was filed with the Clerk of the Court on February 13, 1980, and received by petitioner on February 15, 1980.

## CONCLUSION

WHEREFORE, it is respectfully prayed that the foregoing Supplement be admitted and made a part of the Petition for a Writ of Certiorari filed on May 12, 1980.

Respectfully submitted,
LAW OFFICES OF FREDERICK HETTER
By: (s) FREDERICK HETTER
Attorneys for Petitioner

# APPENDIX "E"

**UNITED STATES DEPARTMENT OF JUSTICE**
**Immigration and Naturalization Service**
**San Diego, California**
**ORDER TO SHOW CAUSE and NOTICE OF HEARING**

In Deportment Proceedings under Section 242 of the Immigration and Nationally Act.

UNITED STATES OF AMERICA )
In the Matter of )
GARCIA-Jaramillo, Rodolfo )
Respondent. )

To: **Rodolfo GARCIA-Jaramillo** File No: **A30 581 018**
**3567 Ames Street, San Diego, California 92111**

Address (number, street, city, state, and zip code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

(A) 1. You are not a citizen or national of the United States;
(A) 2. You are a native of **Mexico**
and a citizen of **Mexico**
(A) 3. You entered the United States at **El Paso, Texas** on or about **August 3, 1973;**
(date)
(SEE ATTACHED CONTINUATION SHEET)

And on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

(SEE ATTACHED CONTINUATION SHEET)

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at **U.S. Immigration Office - Port of Entry, San Ysidro, CA. There is parking to the north of the main** on **November 23, 1976** at **1:00 p.m.**, and

show cause why you should not be deported from the United States on the charge(s) set forth above.
building. **DO NOT ENTER MEXICO.** Please present this notice to the receptionist when appearing for hearing.

Dated: **October 28, 1976**
IMMIGRATION AND NATURALIZATION SERVICE
(s) ARTHUR W. SHANKS
(signature and title of issuing officer)
Arthur W. Shanks, Assistant District Director, Investigations, San Diego
(City and State)

EXHIBIT NO. _____
DEC 8 1976 (s) JM
(Date) ( )

## APPENDIX "F"

**UNITED STATES DEPARTMENT OF JUSTICE**
**Immigration and Naturalization Service**

**A30 581 018—San Diego, California** **May 17, 1977**

**In the Matter of** )
)
**Rodolfo GARCIA-Jaramillo** )
**Respondent** )

**IN DEPORTATION PROCEEDINGS**

**CHARGE: Act of 1952—Section 241(a)(1)—Excludable at Entry under Section 212(a)(14)—No valid labor certification.**

**Act of 1952—Section 241(a)(1)—Excludable at Entry under Section 212(a)(19)—Procured visa by fraud or by wilfully misrepresenting a material fact.**

**Act of 1952—Section 241(a)(1)—Excludable at Entry under Section 212(a)(20)—Immigrant—No valid immigrant visa or equivalent entry document.**

**APPLICATION: Termination of proceedings.**

**ON BEHALF OF RESPONDENT**
**Sam J. Cerniglia, Esq.**
**Ashley, Brady & Cerniglia**
**530 Broadway, Suite 914**
**San Diego, Ca. 92101**

**ON BEHALF OF SERVICE**
**Harold J. Neubauer, Esq.**
**Trial Attorney, INS**
**San Diego, Ca. 92188**

## DECISION OF THE IMMIGRATION JUDGE

The respondent Garcia is a 28 year old alien, a native and citizen of Mexico who was admitted to the United States for

permanent residence on August 3, 1973 **(Exhibit 2)**. He was in possession of an immigrant visa issued to him earlier the same day by the American Consul at Tiajuana, Mexico. He obtained the visa and was admitted as an immigrant classified IR-1, under Section 201(b) of the act as the "immediate relative" spouse of a citizen of the United States. As an immediate relative he was exempt from the normal numeral restrictions imposed on natives of the Western Hemisphere. In addition, as the spouse of Maria Yolanda Almengor who had been born in this country, he was not required to comply with the labor certification requirement of Section 212 (a)(14) of the Act.

The Service contends, in essence, that respondent procured his immigrant visa as the husband of Almengor by fraud or by wilfully misrepresenting material facts because their marriage was a sham, entered into solely by respondent for immigration purposes. It follows the Service asserts that the respondent is now deporatble under Section 241(a)(1) as an alien excludable at the time of his immigration on August 3, 1973, under Section 212(a)(19) for concealing material information concerning the purported marriage from the Consul because he knew that he would not be issued an immigrant visa if the true facts had been known. The Service maintains that the respondent was coming to this country for the purpose of performing skilled or unskilled labor and was excludable under Section 212 (a)(14) because he was not entitled to the certification waiver of the Secretary of Labor as the spouse of a citizen. Finally, the Service claims that the

immigrant visa issued to the respondent on the basis of material misrepresentations was invalid and consequently the respondent was also excludable under Section 212(a)(20) of the Act for lack of a valid entry document.

During the course of the hearing at which time he was represented by counsel, the respondent, Mr. Donald Smith and Mr. James Burton testified. The record contains various exhibits the Order to Show Cause **(Exhibit 1)**, the Immigrant Visa and Alien Registration **(Exhibit 2)**, documents relating to the termination of respondent's marriage on February 26, 1973 **(Exhibit 3)**, Almengor's statement of August 7, 1975 **(Exhibit 4)**, Ochoa's statement of August 26, 1975 **(Exhibit 5)**, a 2-page Investigative Report dated October 14, 1976 **(Exhibit 6)**, and the deposition testimony of Almengor and Ochoa taken in El Paso, Texas on February 9, 1977 **(Exhibit 7)**. The Investigative Report dated October 14, 1976 which has been marked **Exhibit 6** has been afforded no weight since the person interviewed by INS, Mr. Luis Medrano, was not presented for cross-examination.

While the precise details of all of the events that occurred are uncertain, it is clear that the respondent, born July 6, 1948, in Mexico, married Almengor in Las Cruces, New Mexico on March 27, 1973, while he was temporarily in the United States. Although many of the other facts concerning the event leading up to and following the marriage are in dispute, it has been clearly established that there was an agreement between the parties that Almengor would marry the respondent and

assist him in immigrating in exchange for a payment of $200.00 and a promise that he would later terminate the marriage and pay all of the Court costs. It has been established that the parties never resided together as man and wife, that they did not jointly own any property, that they permanently separated on August 1, 1973 four months and three days after the ceremony, that they parted prior to respondent's immigration, that there has been no reconciliation, that the marriage was dissolved by Court Order on February 26, 1976, and that during all of the critical times Almengor has been a practicing lesbian.

Section 201(b) of the Act provides, in pertinent part, for the preference immigration of spouses of United States citizens. This generous provision permitting an alien spouse of a United States citizen to acquire lawful permanent residence status without regard to the usual limitations, was included in the Act to prevent the separation of families and to preserve the marital unit. House of Representatives Report number 1365, 82nd Congress, Second Session. 1680 (1952). See also **Gonzalez-Portillo**, 13 I&N Dec. 309 (1969).

It is well established that such benefits will not be conferred on the basis of a sham marriage or one that is not viable. **Matter of Lew,** 11 I&N Dec. 148 (DD 1965); **Matter of Kitsalis**, 11 I&N Dec. 613 (BIA 1966); **Matter of Harris**, Int. Dec. 2336 (BIA 1974); and **Matter of Sosa**, Int. Dec. 2469 (BIA 1976).

The critical consideration here, with respect to the bona fides of the marriage, is whether at the time of the ceremony the parties intended to establish a life together.

**Bark v. INS**, 511 F 2d 1200 (9th Cir. 1975).

Counsel argues that the Service case is based almost exclusively on the testimony and claims of Maria Yolanda Almengor, that her testimony is unreliable and contradictory and that she is not worthy of belief.

While Almengor's testimony relating to events that ocurred some four years ago is occasionally at variance, it is substantially consistent on all the material matters. The marriage was a sham from its inception and was not viable when respondent immigrated on August 3, 1973. Garcia's conduct as evidence at trial clearly falls within the construction of Sections 241(a)(1) and 212(a)(14), 212-(A)(19) and 212(a)(20). The arrangements he made with Almengor to enter into the pretended marriage, the agreement with respect to money, the absence of a meaningful or viable relationship, the permanent separation before his immigration, and the termination of the marriage, taken together establish by evidence which is clear, convincing and unequivocal that the facts alleged for deportation are true. Based on the foregoing it is concluded that respondent is now deportable as charged under Section 241(a)(1), inasmuch as he was excludable when first admitted to the United States on August 3, 1973 under Section 212(a)(14) for lack of a valid labor certification, under Section 212 (a)(19) for wilfully withholding critical information from the Consul concerning the purported marriage, and under Section 212(a)(20) since the visa he presented on the basis of the mala fide marital relationship was invalid.

One other matter deserves comment. In the hearing we have carefully observed the respondent as he testified. We find his testimony by and large incredible. Most difficult to believe when considering the record as a whole, is respondent's claim that Almengor first brought up the subject of marriage, that she wanted to have a baby, that respondent's immigration status was never discussed prior to the marriage, and that Almengor made all of the arrangements to immigrate the respondent without his knowledge.

Finally, the respondent's application for voluntary departure will be denied in the exercise of discretion. Garcia's somewhat less than candid testimony under oath during the hearing, coupled with his limited ties to this country, persuade us that he is not even deserving of this minimal form of relief. Accordingly, the following order will be entered:

ORDER: IT IS ORDERED that the respondent be deported from the United States to Mexico on the charge contained in the Order to Show Cause.

(s)JOHN C. WILLIAMS
Immigration Judge

## APPENDIX "G"

(SS)

**UNITED STATES DEPARTMENT of JUSTICE**
**Board of Immigration Appeals**
**Washington, D.C. 20530**

MAY 30, 1978

File: A30 581 018 - El Centro
In re: RODOLFO **GARCIA**-JARAMILLO
IN DEPORTATION PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT:
Frederick Hetter, Esquire
2220 Fifth Avenue
San Diego, CA 92101

CHARGE:
Order:
Sec. 241(A)(1), I&N Act (8 U.S.C. 1251(a)(1) - Excludable at entry under section 212(a)(14), 8 U.S.C. 1182(a)(14) - No valid labor certification.

Sec. 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1)) - Excludable at entry under section 212(a)(19), 8 U.S.C. 1182(a)(19) - Procured visa by fraud or by wilfully misrepresenting a material fact.

Sec. 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1)) - Ex-

cludable at entry under section 212(a)(20), 8 U.S.C. 1182(a)(20) - No valid immigrant visa or equivalent entry document.

APPLICATION: Termination
ORDER:

PER CURIAM. We find no merit in the respondent's contentions on appeal. Our review of the record satisfies us that the references to "homosexuality" were not improper and that deportation was established by evidence which is clear, convincing, and unequivocal. We note further that the respondent has not established that he was prejudiced by the Government's failure to make the subject of the investigative report marked "Exhibit 6" available for questioning. The record reflects that this report was not given any evidentiary weight by the immigration judge, and the respondent has not shown that the testimony of this potential witness would have been significant. Moreover, the respondent did not object to the unavailability of this witness, except with respect to the admissibility of the report, until after the immigration judge issued his decision. The decision of the immigration judge is affirmed. The appeal, accordingly, is dismissed.

(s) MARY P. MAGUIRE
Acting Chairman

## PROOF OF SERVICE

STATE OF CALIFORNIA )
ss.
COUNTY OF RIVERSIDE )

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush Street, Santa Ana, CA 92701.

On May 27, 1980, I served the within Supplement To Petition for Writ of Certiorari on the interested parties in said action, by placing a true copy in each of 3 envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California addressed as follows:

WADE McCREE
Solicitor General of
The United States
Department of Justice
Washington, D.C. 20530

MARGARET J. PERRY
Attorney
Department of Justice
Washington, D.C. 20530

JAMES J. O'KEEFE
District Director
Immigration and Naturalization Service
880 Front Street
San Diego, CA 92188

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on May 27, 1980 at Santa Ana, California.

Jack Gallagher